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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO LEOPOLDO TORRES-CAPOTE,

Defendant and Appellant.

C042327

(Super. Ct. No. 00F02857)

An amended complaint-deemed-information charged defendant Antonio Leopoldo Torres-Capote with 18 counts relating to the physical and sexual assault of his wife, M. D.,¹ and threats against a potential witness. Defendant pleaded no contest to

¹ The victim reported that in the course of a 14-year relationship, she had "divorced [defendant] three times, however, continued to remarry him" It is unclear whether they were married or divorced at the time of the events leading to the charges against defendant.

two counts of inflicting corporal injury upon M. D. resulting in a traumatic condition (Pen. Code, § 273.5, subd. (a)²--counts one and two), one count of assaulting M. D. with a deadly weapon, a knife (§ 245, subd. (a)(1)--count three), and three counts of sexual battery against M. D. (§ 243.4, subd. (a)--counts four, six and thirteen). He also admitted that he used a deadly weapon, a knife, in the commission of counts one and three, causing the offenses to be serious felonies within the meaning of section 1192.7, subdivision (c)(23). (§ 12022, subd. (b)(1).) The court sentenced defendant to 10 years in prison, including a one-year enhancement for personal use of a knife in count one.

On appeal, defendant argues that the knife use findings made following his change of plea to count three were unnecessary and erroneous, and should be dismissed or vacated. Because the findings involved an element of the felony assault adjudicated in count three, defendant contends the knife use enhancement was unauthorized under *People v. McGee* (1993) 15 Cal.App.4th 107. Defendant contends he is aggrieved because the knife use findings "expose him to possible multiple punishment on an additional and invalid legal basis, for one and the same act; and they potentially lighten the prosecutorial burden to prove such allegations with sufficient evidence beyond a reasonable doubt." In response to the People's claim that

² Further undesignated section references are to the Penal Code.

defendant's appeal should be dismissed for failure to comply with section 1237.5, defendant insists he is not challenging the validity of the plea, but only the unauthorized findings made by the court after he admitted using a knife. For this reason, he says he was not required to obtain a certificate of probable cause. We reject the latter argument, and conclude dismissal is required.

FACTS AND PROCEDURAL HISTORY

A description of defendant's criminal acts is unnecessary to the resolution of the issues raised in this appeal. We focus instead on the transcript of the change of plea hearing.

On the morning jury selection was to begin, counsel announced the parties had reached a disposition. The prosecutor said it was a "ten-year offer." She explained that "defendant would be pleading to six felony counts, two of which will be strikes, which occurred on separate days. [¶] It would be to Count One, 273.5, [a] felony, and I have added, writing the words and language of a use of a weapon, personal use of a weapon, that being the knife. [¶] He would be pleading to Count Two, 273.5, [a] felony. [¶] He would be pleading to Count Three as a strike. That would be the second strike. That would be a 245, with the use of a deadly weapon, a knife. . . ." The following discussion related to count three:

"THE COURT: Now, is there going to be an enhancing language in that as well?

"[THE PROSECUTOR]: The language of the knife is already contained in the body of the Complaint, and that would be sufficient for a strike language.

"THE COURT: Without the enhancing language?

"[THE PROSECUTOR]: Yes. We can put the enhancing language on. I'd be more than happy to write that out as well.

"THE COURT: I'm not one hundred percent certain it's required. My understanding, for purposes of a strike, when a subsequent Court looks back, they can look to the whole record. Rather than having that Court look at the entire record, it seems that it would suffice with the --

"[THE PROSECUTOR]: I would add that use of a knife, attached to Count Three.

"THE COURT: The same language as to Count One.

"[THE PROSECUTOR]: Yes. . . .

Defendant and counsel approved the disposition that the prosecutor described.

After obtaining defendant's waiver to various constitutional rights, the court accepted his change of plea in count three:

"THE COURT: All right. Count Three of the same Information, you are charged with a violation of Section 245(a)(1) of the Penal Code of the State of California, in that you did, on or about April 1st, 2000, in the County of Sacramento, State of California, willfully and unlawfully commit an assault on [M. D.], with a deadly weapon, to wit, a knife.

"To that charge, what is your plea?

"THE DEFENDANT: No contest.

"THE COURT: Also, it is further alleged, in the commission of the above offense, you used a deadly weapon, to wit, a knife, within the meaning of Penal Code Section 12022.5, also causing the above offense to be a serious felony, within the meaning of Penal Code Section 1192.7(c)(23).

"Once again, that allegation also is a strike allegation, which means that should you, after getting out of prison, commit another felony, that would be two strikes. Then the sentence will be twenty-five years to life.

"Do you understand that?

"THE DEFENDANT: If I accept these, I will have two strikes.

"I only have one strike.

"THE COURT: You've already admitted one. When you add in this, you will have two. That's not going to affect this plea bargain.

"But when you get out of prison, if you commit -- if you commit and are convicted of another felony, then you will be a three-strike candidate. You will face the potential of twenty-five years to life.

"Do you understand that?

"THE DEFENDANT: Yes.

"THE COURT: All right. Now, do you admit or deny this enhancing allegation of a strike in Count Three?

"Do you admit or deny it?

"THE DEFENDANT: If I don't admit the second felony, do you have to have a trial?

"THE COURT: If you don't admit the second felony, all bargains are off, and we start a jury trial today.

"THE DEFENDANT: Okay. Admit.

"THE COURT: Let the record reflect admission of a second strike allegation in terms of any future conviction of a felony after having been release[d] from prison. He's been advised, acknowledged his being advised, has questioned it, has been informed of the consequences, and has admitted the second strike allegation."

Thereafter, the court entered the pleas and admissions, stating with respect to counts one and three: "No contest plea will be entered as to Count One, along with the enhancing -- admission of the enhancing language, causing Count One to become a strike for future purposes. [¶] . . . [¶] No contest plea is entered as to Count Three, along with the enhancing language as to Count Three, causing it to become a strike, should [defendant] be convicted of another felony."

The court did not sentence defendant to any additional time as a result of his admission of the knife use enhancement.

DISCUSSION

Section 1237.5 provides: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the

trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶]

(b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

California Rules of Court, rule 31(d) further explains that "[i]f the appeal from a judgment of conviction entered upon a plea of guilty or nolo contendere *is based solely upon grounds (1) occurring after entry of the plea which do not challenge its validity or (2) involving a search or seizure, the validity of which was contested pursuant to section 1538.5 of the Penal Code, the provisions of section 1237.5 of the Penal Code requiring a statement by the defendant and a certificate of probable cause by the trial court are inapplicable*" (Rule 31(d), Cal. Rules of Court, 2d par., italics added.)

"The purpose of section 1237.5 is to discourage and weed out frivolous or vexatious appeals following guilty pleas. When a defendant fails to satisfy the requirements of section 1237.5 and the record discloses no justification therefor, the appeal is not operative and the appropriate disposition is dismissal." (*People v. Earls* (1992) 10 Cal.App.4th 184, 190.)

Defendant insists his appeal is properly before us because he does not challenge the validity of his plea. Instead, he asks us to vacate the findings the court made immediately after taking his plea in count three.

Defendant's protestations to the contrary, this appeal is, in fact, a challenge to the validity of his plea, that

is, whether the plea agreement properly included the separate allegation that he personally used a knife pursuant to section 12022, subdivision (b)(1) in count three. The information already alleged in count three that in violating section 245, subdivision (a)(1), defendant "did willfully and unlawfully commit an assault upon [M. D.], with a deadly weapon, to wit, a knife" and gave notice that the offense was a serious felony within the meaning of section 1192.7, subdivision (c)(23) "in that the defendant[] personally used a dangerous and deadly weapon.'" The parties agree that the knife use allegation added at the change of plea "was not necessary" to establish that count three was a serious felony and therefore a second "strike." However, that fact is irrelevant to whether the issue is properly before us.

As defendant points out, "[i]n determining whether section 1237.5 applies to a challenge of a sentence imposed after a plea of guilty or no contest, courts must look to the substance of the appeal: 'the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made.'" (*People v. Panizzon* (1996) 13 Cal.4th 68, 76.) Here, it was essential to the formula outlined by the prosecutor, and agreed to by defendant, that defendant plead to six felonies, two of which would be strikes. In order to assure that counts one and three were identified as serious felonies, the prosecutor amended the information to add the enhancement language to count one, and upon questioning by the court, to count three. Defendant cannot change the substance of his claim

of error simply by switching focus from his admission to the now disputed enhancement in count three, made in accordance with the plea agreement, to the findings that later summarized the pleas and admissions that were entered by the court.

DISPOSITION

The appeal is dismissed.

DAVIS, J.

We concur:

BLEASE, Acting P.J.

MORRISON, J.